No. 80-782

In the Supreme Court of the United States

OCTOBER TERM, 1980

ANTONIO OLEGARIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

DAVID B. SMITH
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTIONS PRESENTED

1. Whether the temporary withdrawal of naturalization authority from the American Vice-Consul in Manila in 1945 deprived petitioner of any constitutional or statutory right to apply for naturalization under the terms of the Nationality Act of 1940, as amended by the Second War Powers Act of 1942.

2. Whether petitioner is entitled to naturalization on the ground that the Justice Department's policy of not opposing petitions for naturalization submitted by similarly situated Filipino veterans before November 30, 1977, is allegedly arbitrary and unfair to those, like himself, who filed their petitions after that cut-off date.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 38a-100a) is reported at 629 F. 2d 204. The opinion of the district court (Pet. App. 1a-37a) is reported at 473 F. Supp. 185.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1980. On October 16, 1980, Justice Marshall extended the time for filing a petition for writ of certiorari to November 12, 1980, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 26, 1941, in response to the deteriorating situation in the Pacific, President Roosevelt issued an order calling all organized military units of the Commonwealth of the Philippines into the armed forces of the United States. On March 27, 1942, Congress amended the Nationality Act of 1940 ("the Act") to provide for the naturalization of noncitizens who served in the United States armed forces. See Second War Powers Act of 1942, ch. 199, Section 1001, 56 Stat. 182. Section 701 of that Act, 56 Stat. 182, exempted certain noncitizen servicemen who served outside the continental United States from some of the usual naturalization requirements, such as a period of residence in this country and literacy in English. Section 702, 56 Stat. 182, provided for the overseas naturalization of persons eligible under Section 701 who were in active service in the United States military and were not within the jurisdiction of any court authorized to naturalize aliens. Section 705, 56 Stat. 183, directed the Commissioner of Immigration and Naturalization ("Commissioner") to make rules and regulations to implement the Act. As amended by subsequent statutes, the 1940 Act specified that all naturalization petitions filed

under Section 701 had to be submitted by December 31, 1946. Act of Dec. 28, 1945, ch. 509, Section 202(c)(1), 59 Stat. 658 (Pet. App. 40a-42a, 47a).

Pursuant to the Act, Immigration and Naturalization Service officers were sent to overseas military bases to naturalize noncitizen members of the United States armed forces. Although the Act could not be effectuated in the Philippines during the Japanese occupation, approximately 7000 Filipinos were naturalized in the United States or at military posts outside the Philippines. In August 1945, following the liberation of the Philippines, George H. Ennis, Vice Consul of the United States at Manila, was designated to naturalize aliens under the Act, and naturalizations in the Philippines began.[1]

The Philippines were scheduled to become an independent country on July 4, 1946. The Phillippine government feared that a mass emigration of newly naturalized Filipinos would deprive the country of much needed manpower and thwart post-war reconstruction efforts. This concern was conveyed to the State Department which passed on the information to the Commissioner. The Commissioner, in turn, recommended that the "situation might best be handled by revoking the authority previously granted to Mr. Ennis and by omitting to designate any representative authorized to confer citizenship in the Philippine Islands" (Pet. App. 44a). Thereafter, the Attorney General revoked Vice Counsel Ennis's naturalization authority and Ennis stopped naturalizing aliens after October 26, 1945 (Pet. App. 43a-44a).

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[1]There was a serious question as to whether service in the Army of the Philippine Commonwealth pursuant to the President's 1941 Order qualified as service in the United States armed forces for purposes of the Act. That issue was initially resolved by the government in favor of the Philippine veterans, thus permitting the commencement of naturalization proceedings in the Philippines (Pet. App. 43a & n.3).

Several months later, Congress enacted the First Supplemental Surplus Appropriation Recision Act of 1946. See ch. 30, 60 Stat. 14. In relevant part, this statute provided that service in the Philippine Army pursuant to President Roosevelt's 1941 Order

> shall not be deemed to be or to have been service in the military or naval forces of the United States or any component thereof for the purposes of any law of the United States conferring rights, privileges, or benefits upon any person by reason of the service of such person or the service of any other person in the military or naval forces of the United States * * * .

Pet. App. 45a n.4. Accordingly, in July 1946, INS reversed its previous position and henceforth viewed Filipinos inducted into the Commonwealth Army under the President's 1941 Order as not eligible for naturalization under the Act. See Pet. App. 43a & n.3, 46a & n.5.[2] This new interpretation of the Act greatly reduced the number of Filipino servicemen who could qualify for citizenship under Sections 701 and 702 (Pet. App. 46a-47a).[3]

The INS appointed a new naturalization representative for the Philippines, P.J. Phillips, who began processing petitions in August 1946. From that time until the Act expired on December 31, 1946, Phillips naturalized approximately 4000 Filipinos pursuant to Sections 701 and 702.

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[2]The INS maintained this new position until 1957. See *In re Naturalization of Munoz*, 156 F. Supp. 184 (N.D. Cal. 1957).

[3]It appears that only members of the Philippine Scouts, a United States Army unit with relatively small enlistment, and Filipinos who had individually enlisted in the regular United States armed forces, remained eligible for administrative naturalization under the July 1946 interpretation of the law.

No INS official was present in the Philippines to implement the Act during the nine month period after Ennis's authority was revoked and before Phillips was appointed.

2. Petitioner is a 61-year-old Philippine citizen who served in the Army of the Commonwealth of the Philippines from December 20, 1941 to December 2, 1945. Until his discharge, he was deemed eligible for naturalization under then governing regulations, and he had an actual opportunity to apply during the two to three month period that Ennis served as an INS representative in the Philippines in 1945.[4] But petitioner took no action. Nor is there any suggestion that he attempted to assert his statutory right during the ensuing five weeks preceding his discharge on December 2, 1945, nor, indeed, thereafter, until 1978.

Although conceding that he made no attempt to file a timely naturalization petition, petitioner nonetheless contended that his constitutional rights had been violated by the revocation of Vice Consul Ennis's naturalization authority. The district court agreed with petitioner. Reversing a decision rendered by an INS naturalization examiner, the district court concluded that petitioner "had been denied due process of law in a manner which could only be remedied by now admitting [him] to citizenship" (Pet. App. 48a) and, accordingly, granted his petition for naturalization (Pet. App. 29a-37a). The court of appeals reversed in an extensive opinion upon which we rely (Pet. App. 38a-99a).

ARGUMENT

The exhaustive decision of the court of appeals is correct, and does not conflict with any decision of this Court or of any court of appeals. Moreover, the issues presented by petitioner lack general and continuing significance. Accordingly, further review by this Court is unwarranted.

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[4]In this proceeding, the government has not challenged petitioner's statutory eligibility because of his service in the Commonwealth Army, rather than the United States Army. Pet. App. 46a n.5.

1. Petitioner first contends (Pet. 10-13) that the Attorney General's determination to suspend the post-war naturalization process for nine months was an abuse of his discretion under the Second War Powers Act. Although recognizing that the withdrawal of the Vice Consul's naturalization authority in 1945 temporarily frustrated Congress's apparent objective, the court of appeals correctly held that the authority granted to the Executive to effectuate the Act "necessarily included the right to exercise some discretion in enforcing its provisions" (Pet. App. 83a). In the absence of any statutory language to the contrary, the Act could not be interpreted as reflecting an intent to deprive the Executive of its traditional and inherent authority "to consider the foreign affairs ramifications of a particular mode of enforcement and to suspend implementation to avoid a confrontation" with the Philippine government (*id.* at 84a). See *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952); *Mackenzie* v. *Hare*, 239 U.S. 299, 311 (1915). Here, of course, the Attorney General's action was prompted by the strong objections of the Philippine government concerning the deleterious effects of a mass naturalization program on that country's war reconstruction efforts. Accordingly, the court of appeals properly concluded (Pet App. 88a):

> that the executive's authority to implement the 1940 Act included the right to exercise discretion in the face of a potential diplomatic conflict. The decision to withdraw all naturalization authority from the Philippine Islands for a nine month period was not a manifest abuse of that discretion.

See also *INS* v. *Hibi*, 414 U.S. 5 (1973) (government's suspension of naturalization process in Philippines does not give rise to estoppel).[5]

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[5]Indeed, in light of the foreign policy considerations underlying the Attorney General's decision, it is questionable whether that determination is subject to judicial review at all. See *Goldwater* v. *Carter*, 444 U.S.

Petitioner's constitutional claim is equally without merit. Petitioner boldly suggests (Pet. 13-14) that the decision of the Attorney General to suspend the naturalization of the Filipinos was racially motivated. But, as we have outlined above, history clearly shows that the Attorney General's action was prompted by considerations of international diplomacy involving the unequivocal opposition of the Philippine government, and not racial animus (Pet. App. 43a-47a).[6] In other words, the suspension of the naturalization process was "justified in light of the express federal interest in responding to the concerns voiced by the Philippine Government" (*id.* at 98a), even though the Attorney General's decision may have adversely affected certain Filipino servicemen. In light of these circumstances and the Executive's broad discretion over issues of foreign policy and national security, including immigration and naturalization (see, *e.g.*, *Harisiades* v. *Shaughnessy*, *supra*, 342 U.S. at 596; *Kleindienst* v. *Mandel*, 408 U.S. 753, 765-767 (1972)), the court of appeals correctly concluded that petitioner, who failed to file an application for citizenship for more than 30 years, was not deprived of any rights under the Due

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996, 1002-1006 (1979) (Rehnquist, J., concurring); *Narenji* v. *Civiletti*, 617 F. 2d 745 (D.C. Cir. 1979).

[6]Petitioner's statement (Pet. 14-15) that the 35-year-old government memoranda that form the bulk of the record in this case contain "documented expressions of racial and ethnic prejudices" against Filipinos is unsubstantiated. Apart from the objections expressed by the Philippine government, the only concerns reflected in any of the documents had to do with the enormous numbers of Filipinos who might become eligible for admission to the United States, and the fiscal problems that might ensue from paying military pensions and other benefits to this large group of people. See Letter to Ugo Carusi, INS Commissioner, from R. B. Shipley, Passport Division Chief, dated April 17, 1946; Memorandum to T.B. Shoemaker from Edwin J. Shaughnessy, Special Assistant to the Commissioner, dated April 26, 1946; Memorandum to Ugo Carusi, INS Commissioner, from Edwin J. Shaughnessy, dated October 19, 1945.

Process Clause of the Fifth Amendment. See, *e.g.*, *Fiallo* v. *Bell*, 430 U.S. 787, 792-799 (1977); *Mathews* v. *Diaz*, 426 U.S. 67, 77-84 (1976); *Korematsu* v. *United States*, 323 U.S. 214 (1944). See also *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972).[7]

2. Following the decision in *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975), the Department of Justice as a matter of internal litigation policy determined not to oppose naturalization petitions submitted by Filipino veterans before November 30, 1977—the date on which the government decided not to pursue an appeal in the *68 Filipino War Veterans* case. Petitioner argues (Pet. 18-22) that this policy is arbitrary and unfair to those like himself who filed their petitions after the November 30 cut-off date. At the outset we note that petitioner failed to raise this claim in the court of appeals, and thus it is not properly before the Court. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).[8]

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[7]Petitioner relies (Pet. 7, 10-20) on *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975). But that case is inconsistent with the thrust of this Court's decision in *INS* v. *Hibi*, *supra*. In *Hibi*, the Court rejected the claim that the government could be equitably estopped from denying citizenship to another Filipino serviceman, who, like petitioner, may have been disadvantaged by the government's policy decision regarding naturalization in the Philippines. Moreover, as the court of appeals observed (Pet. App. 93a), *68 Filipino War Veterans* erroneously applied a strict scrutiny equal protection analysis rather than the rational relationship test that this Court has applied in cases involving equal protection claims by aliens against the federal government. See, *e.g.*, *Mathews* v. *Diaz*, *supra*, 426 U.S. at 81-87. Finally, we note that subsequent to the decision in this case, the Northern District of California has rejected its prior decision in *68 Filipino War Veterans* and adopted the approach of the court of appeals in this case. See *In re Naturalization of Antolin Punsalan Pangilinan* (N.D. Cal. Sept. 22, 1980), appeal pending, No. 80-4543 (9th Cir.).

[8]The issue was raised in the brief of amici curiae.

In any event, the court of appeals correctly held that the "government's decision to pursue this appeal while not contesting the petitions of other * * * applicants does not deprive [petitioner] of due process of law" (Pet. App. 59a). It is well setled that the government has broad discretion in determining when to file cases or pursue appeals (see, *e.g.*, *United States* v. *Batchelder*, 442 U.S. 114, 123-125 (1979); *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868)), and is not required to maintain a consistent stance in its litigation (see, *e.g.*, *Barrett* v. *United States*, 423 U.S. 212, 222 n.6 (1976); *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183 (1957)). Moreover, here, the Department's prosecutorial decision was predicated on considerations of fairness to Filipino veterans who were then litigating their cases, and not on invidious or improper grounds. Particularly since petitioner was not then litigating his naturalization claim and thus had no expectation that his belated claim would be treated in the same manner as the *68 Filipino War Veterans* case, the Department's internal litigation decision did not trench on any protected right of petitioner's. See *United States* v. *Caceres*, 440 U.S. 741 (1979); cf. *Rinaldi* v. *United States*, 434 U.S. 22 (1979) (*Petite* policy).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

DAVID B. SMITH
Attorney

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